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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 421

STANDARD OIL COMPANY OF LOUISIANA, ET AL., PETITIONERS

v.

STEAM STERNWHEEL TOWBOAT "KONGO" AND RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court, in the form of Conclusions of Law (R. 56–60), is not officially reported. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 317–322) is reported in 155 F. 2d 492.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 27, 1946 (R. 316). The petition for a writ of certiorari was filed August 20,

1946. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioners failed to exercise reasonable diligence to ascertain that the master of respondent vessel was without authority to bind her for supplies and repairs, and are therefore, under the maritime lien act (46 U. S. C., Secs. 971–973), barred from asserting a lien against the vessel for supplies and repairs furnished by them.

STATUTES INVOLVED

The pertinent provisions of the maritime lien act (Act of June 5, 1920, c. 250, Sec. 30, Subsec. P, Q, R, 41 Stat. 1005) are as follows:

46 U. S. C., Sec. 971. *Persons entitled to lien:*

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U. S. C., Sec. 972. *Persons authorized to procure repairs, supplies, and necessaries:*

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

46 U. S. C., Sec. 973. *Notice to person furnishing repairs, supplies, and necessaries:*

The officers and agents of a vessel specified in section 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

STATEMENT

In 1942, one McBride, an experienced river captain of Harrod's Creek, Kentucky, began negotiations with Defense Plant Corporation (hereafter referred to as D. P. C.), a wholly-

owned subsidiary of Reconstruction Finance Corporation, to effectuate a project he had conceived for towing oil up the Mississippi and Ohio Rivers (R. 47). McBride caused the incorporation of a dummy Kentucky company, the United States Barge Lines, Inc., as his *alter ego,* and he was immediately elected its president and general manager (R. 47, 57, 320). He then arranged for the purchase by D. P. C. of respondent towboat *Kongo* (R. 47), which was then leased by D. P. C. to United States Barge Lines, Inc., and repairs begun (R. 47). In the spring of 1943, before any freight or towing operations had been undertaken, the lease was cancelled by D. P. C. and, after extensive negotiations in which McBride personally participated, a charter party was substituted (R. 47–48), with the following provision concerning liens:

> ARTICLE VI. Neither Charterer nor any of its employees or agents shall have any right, power or authority to create, incur, suffer, or permit to be placed or imposed upon said vessel any maritime lien, or other lien, or incumbrance or charge, or to incur debt, obligation or charge upon the credit of said vessel. In the event a libel or other proceeding in rem be filed against the said vessel, based on any claim alleged to have arisen during the term of this Charter Party, or in the event the said vessel is otherwise levied against or taken into custody by virtue of any legal pro-

> ceedings in any court based on a cause of action alleged to have arisen during the Charter Period, Charterer shall within five (5) days thereafter cause the vessel to be released and the asserted lien or claim be discharged. Charterer shall promptly notify Owner of the institution of any libel or other proceeding against the vessel. Charterer shall exhibit or cause to be exhibited copy of this Charter Party to any person having business with said vessel which might give rise to any maritime lien or to any other lien, encumbrance or charge whatsoever (R. 49).

This agreement was duly signed by McBride, on behalf of United States Barge Lines, Inc., on May 17, 1943, and the Board of Directors of D. P. C. authorized execution on its behalf on May 21, 1943, and the actual signing by D. P. C. took place on June 3, 1943 (R. 48).

On May 27, 1943, McBride, as master, took over possession and operation of the boat at New Orleans, and after picking up the oil barges to be towed, he started up the Mississippi River on May 30, 1943 (R. 49). At Baton Rouge, La., McBride purchased fuel oil from petitioner Standard Oil Company of Louisiana (R. 50, 52), various materials and supplies from petitioners Standard Supply and Hardware Company (R. 50, 52) and Charles Carter (R. 78–79, 273–276), and services and materials from petitioner

Yaun Welding, Boiler, and Machine Works (R. 50, 53). At Memphis, Tenn., an additional supply of oil, together with a boiler plate, was obtained from the Standard Oil Company, and some boiler repairs were made by petitioner Southern Boiler and Tank Works (R. 50, 52, 53). At Louisville, Ky., McBride had petitioner Peter Jensen and Company make certain further repairs (R. 50, 54). Payment was not made for any of these supplies or services (R. 50).

Throughout the trip, the *Kongo* carried, on both sides, a large sign bearing the name "United States Barge Lines, Inc.", and also a sign stating "Property of Defense Plant Corporation an Instrumentality of the United States Government" (R. 50, 321). All of the petitioners, except Yaun, were actually aware that D. P. C. owned the boat (R. 52–54, 79). But none of the petitioners, except Standard Oil at Memphis, made any inquiries concerning the existence of a charter or its terms, or even knew that the boat was operating under charter (R. 52–54, 79). Standard Oil's Memphis representatives were informed by McBride that the vessel was chartered by D. P. C. to United States Barge Line, Inc., but they neither asked to see the charter nor inquired about its provisions (R. 52). Accordingly, none of the petitioners had actual knowledge of the bare-boat provision, quoted above, which denied the charterer or its

agents authority to bind the vessel (R. 318). To each petitioner, McBride represented, despite the terms of the charter which he had participated in drawing, that he had authority as master to order the materials or services (R. 53, 55, 318), and petitioners apparently rested on these representations without more. No copy of the charter was aboard the ship (R. 59, 318), but copies were filed with the office of the United States Barge Lines, Inc. at Louisville (R. 48), and the Louisville office of D. P. C. (R. 48). Moreover, D. P. C. had branch offices in each of the cities in which the petitioners carried on their business and furnished supplies or services to the *Kongo* (Baton Rouge, Memphis, Louisville), as well as in New Orleans (R. 48). Inquiry at any of these offices by telephone, telegraph, or letter would either have produced adequate information as to the charter contents, or have been referred to Washington and promptly answered from there (R. 321, 59–60, 212–219).

After delivery of the oil at a Pennsylvania river port, the *Kongo* returned to Louisville and was there repossessed by D. P. C., on August 17, 1943, for non-payment of the charter hire (R. 50–51, 318). The seamen were discharged without being paid their full wages. McBride himself compensated all but two of the seamen, and took assignments of their wage claims (R. 52, 318).

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Libels against the vessel and the United States as sole stockholder of D. P. C.[1] were immediately filed by the two unpaid seamen and by McBride, as assignee of the others (R. 1, 46). Petitioners, and several other furnishers of supplies and services, intervened to claim liens against the boat (R. 46). The United States Barge Lines, Inc., which had no property and no capital (R. 47, 57), was adjudicated bankrupt in January 1944 (R. 55).

The District Court decreed judgment for the two seamen who had not assigned their wage claims,[2] dismissed McBride's libel as assignee on the ground that he was actually the charterer and could not therefore obtain a lien by assignment, and dismissed the libels of the intervening furnishers because they had not been reasonably diligent in investigating McBride's authority to bind the boat (R. 56–61, 78). The Circuit Court of Appeals affirmed the judgment both as to the assigned claim for wages and the furnishers' claims for supplies and services (R. 316–322), agreeing with the District Court that the inter-

[1] In the Circuit Court of Appeals, by agreed motion, Reconstruction Finance Corporation was substituted for D. P. C. (R. 315–316, 322), since Public Law No. 109, 79th Congress, 1st Sess., approved June 30, 1945, had dissolved D. P. C. and transferred all of its functions, powers, duties, and authority, together with all of its assets and liabilities, to Reconstruction Finance Corporation.

[2] No appeal was taken by the United States or D. P. C. as to this adverse part of the judgment.

veners had not exercised reasonable diligence to ascertain the terms of the charter party, as required by the maritime lien act (46 U. S. C. Sec. 973) (R. 321–322).

The instant petition for a writ of certiorari is presented by six of the intervening furnishers, and raises only the question of their diligence (Pet. p. 3–4). No question is presented, or could be raised by these petitioners, as to the claims for wages.

ARGUMENT

Petitioners present only the issue of their compliance with the statutory obligation resting on a furnisher, desiring to obtain a maritime lien, to show that he did not know and by the "exercise of reasonable diligence" could not have ascertained that "because of the terms of a charter party * * * the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." 46 U. S. C., Sec. 973. The two courts below have denied petitioners' claims on the ground that they did not exercise the necessary reasonable diligence to discover that the instant charter-party forbade McBride from binding the *Kongo* for repairs or supplies. This decision clearly follows from the uncontroverted facts, and fully accords with the established rule declared by this Court and consistently applied by the lower federal courts.

1. The rule governing a material-man's responsibility, where the owner has denied the charterer authority to bind the ship, has been settled for over two decades. In the leading case, *United States* v. *Carver,* 260 U. S. 482, this Court discussed the terms of the proviso of 46 U. S. C., Sec. 973 as follows:

> We regard these words as too plain for argument. They do not allow the material-man to rest upon presumptions until he is put upon inquiry, they call him to inquire. To ascertain is to find out by investigation. If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both [260 U. S., at 489].

In *Dampskibsselskabet Dannebrog* v. *Signal Oil and Gas Co.,* 310 U. S. 268, this rule was expressly reaffirmed, and the Court took occasion to point out that an owner who does not desire the charterer to burden the vessel "has a simple and ready means of protection. All that it is necessary for him to do, as the material-man dealing with the charterer is charged with notice of the charter, is to provide therein that the creation of

maritime liens is prohibited." (310 U. S., at 280.) Petitioners do not purport to challenge this settled rule, but they make some slight attempt to avoid its application by asserting that the supplies in the *Carver* case were ordered "not by the master, but by a shore agent who is not presumed to have authority" (Pet., p. 4). But in requiring reasonable diligence by a furnisher, the statute does not differentiate between persons presumed to have authority under 46 U. S. C. Sec. 972, and others. Section 973 plainly specifies that nothing in the maritime lien act—including, of course, the provisions of Section 972—shall confer a lien contrary to a charter provision, unless the furnisher was reasonably diligent in investigating the authority of *any* person ordering the repairs or supplies. Moreover, the opinion in the *Carver* case indicates that the materials were furnished "upon the orders of the [chartering] corporation's port captain who was charged with the duty of procuring them"[3] (260 U. S., at 488), and this Court, then and in the later *Signal Oil* case, as well as the lower courts (cited in note *5, infra,* p. 13), have obviously treated the case exactly as if the supplies had been furnished on order of the master.

[3] Section 972 includes among persons presumed to have authority from the owner to procure supplies, etc. "any person to whom the management of the vessel at the port of supply is intrusted."

2. The lower courts correctly applied this established rule and found that petitioners had failed to exercise the required degree of diligence. D. P. C., as owner, had expressly denied to the United States Barge Lines, Inc., and its agents, all authority to bind the towboat for supplies, and provided that the charterer was to exhibit the charter party, containing this limitation, to persons having business with the vessel "which might give rise to any maritime lien or to any other lien, encumbrance or charge whatsoever" (R. 49). Petitioners, however, made no real effort to ascertain either the existence or the terms of the charter, though it should have been obvious to them, if only from the two signs plainly visible on the boat (R. 50), *supra*, p. 6, that the vessel was being operated by another than the owner. None of the claimants, except one, even went so far as to mention the possibility of a charter, and that petitioner neither asked to see the agreement nor made inquiry as to its provisions. See *supra*, p. 6. If through the exercise of ordinary foresight, petitioners had become aware of the existence of the charter, they then could easily and authoritatively have discovered its terms through the D. P. C. branch offices in petitioners' home cities, or at the charterer's office at Louisville. Certainly, claimants who made no efforts at all can hardly contend, on this record, that it would have been useless or unduly burdensome for them

to take these elementary steps. And if the results of initial investigation proved unsatisfactory or delayed, petitioners were always free to decline to service the vessel.

3. Despite the settled rule that the furnisher has the burden of inquiry, and cannot rest on presumptions, petitioners urge that "no investigation was required beyond the *Kongo* and her master" (Pet., p. 3).[4] This contention contradicts the basic statutory policy and is plainly at variance with the facts and the opinion of the *Carver* and *Signal Oil* cases, as well as with the consistent line of lower court decisions.[5] The proviso to Section 973 would serve no purpose if

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[4] It is clear that an investigation of the boat would, at the least, have put the petitioners upon inquiry that it was under charter (R. 50). The absence of the charter from the ship's papers might then have raised some doubts as to the master's authority.

[5] *The Admiral Goodrich*, 288 Fed. 362 (C. C. A. 9); *Deibert Barge-Bldg. Co.* v. *United States*, 289 Fed. 805 (C. C. A. 4); *United States* v. *Rapid Coaling & Transfer Co.*, 289 Fed. 803 (C. C. A. 4); *Morse Dry Dock & Repair Co.* v. *United States*, 1 F. 2d 233 (C. C. A. 2), certiorari denied, 266 U. S. 620; *P. H. Gill & Sons Forge & Machine Works* v. *United States*, 1 F. 2d 964 (C. C. A. 4); *United States* v. *Robins Dry Dock & Repair Co.*, 13 F. 2d 808 (C. C. A. 1); *The Liberator*, 5 F. 2d 585 (C. C. A. 4); *North Coast Stevedoring Co.* v. *United States*, 17 F. 2d 874 (C. C. A. 9); *The Western Wave*, 77 F. 2d 695 (C. C. A. 5), certiorari denied, 296 U. S. 633; *The Thordis*, 290 Fed. 255 (E. D. N. Y.); *The Westhaven*, 297 Fed. 534 (D. Md.), affirmed, 3 F. 2d 1021 (C. C. A. 4); *The Castlewood*, 298 Fed. 184 (E. D. Pa.), affirmed, 5 F. 2d 1013 (C. C. A 3); *The Henry W. Breyer*, 17 F. 2d 423 (D. Md.); *The Ben Lawers*, 42 F. 2d 897 (W. D. Wash.).

Congress had not desired to afford an owner, not in control of the vessel, some protection from a charterer's facile misrepresentations by word or act. For that reason, the Circuit Courts of Appeal have uniformly held that a material-man cannot rely on the bald and general representations of the person in possession of the vessel, as petitioners claim to have done here. *Morse Dry Dock & Repair Company* v. *United States,* 1 F. 2d 233, 237–238 (C. C. A. 2), affirming 298 Fed. 153, 157 (S. D. N. Y.), certiorari denied, 266 U. S. 620; *P. H. Gill & Sons Forge & Machine Works* v. *United States,* 1 F. 2d 964, 965 (C. C. A. 4); *United States* v. *Robins Dry Dock & Repair Co.,* 13 F. 2d 808, 811–812 (C. C. A. 1); instant case, 155 F. 2d at 496 (R. 321). The foregoing, we submit, effectively disposes of petitioners' argument based upon an attempted distinction between "resting" and "relying" on a presumption (Pet., p. 5). By the same token, it should not be enough that the petitioners have now discovered that the charter, in which they had no interest at the time, was not kept by McBride among the ship's papers.

In order to protect both itself and material-men, D. P. C. specifically bound the charterer to show the agreement to all potential furnishers, and the charterer's failure to comply cannot be charged to the absent owner. As we have shown above, petitioners could probably have ascertained

the actual terms of the charter without difficulty or delay, or, if the matter turned out to be burdensome, they could have refused to deal with McBride.

CONCLUSION

The findings and decision of the two lower courts are correct and fully accord with the decisions of this Court, and of the lower Federal courts. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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